

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

NO. 74-2604

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P/S

United States Court of Appeals FOR THE SECOND CIRCUIT

No. 74-4013

**CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CON-
CRETE PRODUCTS CORP., AND GRAND PRE-STRESSED CORP.,**
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

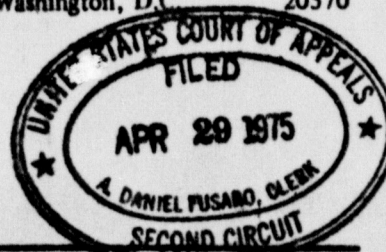
**On Petition for Review and Cross-Applcation for
Enforcement of an Order of The National Labor Relations Board**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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Respondent.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging six employees because of their union activities.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Clearview Concrete Pipe Corp., d/b/a Clearview Concrete Products Corp., and Grand Pre-Stressed Corp., hereafter "the Company"¹ pursuant to Section 10(f) of the Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) to review and set aside the Board's Decision and Order (A. 20-53),² issued against the Company on November 7, 1974 and reported at 214 NLRB No. 98. The Board has cross-applied for enforcement of its order. This Court has jurisdiction over the proceedings since the unfair labor practices occurred in Deer Park, Suffolk County, New York, which is within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company is engaged in the manufacture, sale and distribution of concrete pipe, pre-stressed concrete and related products in Deer Park, New York. At the time of the events herein, the Company employed about 70 employees, including six maintenance employees, Earl Nare, Louis and Peter Leonardi, George Bartoli, John Winfield, and Salvatore DiSomma (A. 22; Tr. 27, 51-52). The maintenance employees performed various tasks relating to the maintenance of the Company's trucks and equipment, including lubrication, engine maintenance and repair, cleaning and painting — "everything a garage would do" (A. 29-30; Tr. 341-342).

¹ It is stipulated that Clearview and Grand constitute a single integrated enterprise operating with common officers, ownership and direction and with a common labor policy affecting their employees (A. 21; Tr. 6-7).

² "A." references are to the printed Appendix. "Tr." references are to transcript of the hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Most of the Company's employees were represented in three separate contractual bargaining units by the Teamsters, the Operating Engineers and the Laborers (A. 22; Tr. 18-19, 28, 309), but the six maintenance employees were unrepresented (A. 22; Tr. 84).

In late June 1973, employee Nare contacted the business representative of the Union,³ Rizzo, and indicated to him that the Company's maintenance employees were interested in joining a labor union (A. 22; Tr. 29-30). On July 6, Rizzo met with four of the maintenance employees (Nare, Winfield and the Leonardi brothers), discussed organizing procedures, and passed out Union authorization cards (A. 22; Tr. 30, 32-33, 85, 108-109, 128). By July 16, all six maintenance employees had signed Union authorization cards and on that date the cards were mailed as a group to the Union (A. 22; Tr. 33-34, 87, 110, 129, 146).

By a letter dated July 20, Friday, the Union advised the Company that it represented a majority of the Company's mechanics, helpers, welders, maintenance and service employees, offered to furnish proof of its majority, and requested recognition as the bargaining agent for said employees (A. 22; Tr. 344, GCX 2). This letter was received by the Company by at least July 23 (A. 25; Tr. 172).

B. The interrogation and threats of discharge

About July 20, night shift maintenance employees Louis and Peter Leonardi went into Superintendent Francis office to get their assignments for the night off the blackboard, and Superintendent Francis asked Louis

³ Local 447, District 15, International Association of Machinists and Aerospace Workers, AFL-CIO, hereafter referred to as "the Union" or "Machinists Local 447."

Leonardi what kind of union he was in at his previous job with the bus company (A. 23; Tr. 88-89, 111-112). When Louis Leonardi named the union, Francis asked him if that union "has anything to do with 447 of the Machinists Union." Louis replied "no" (A. 23; Tr. 88-89, 112, 282-283). Thereafter, on a daily basis until August 2, when Louis and Peter Leonardi were discharged, Francis would make remarks to them concerning the Union, such as, "I know you guys signed cards, who started it?" and "The Companies are not going to put up with it. You guys are all going to get laid off. You went about it the wrong way" (A. 23; Tr. 90-91, 112-113). Peter Leonardi never replied to Francis's questions (Tr. 113) and Louis Leonardi refused to reveal the requested information (A. 23; Tr. 90). Also, beginning on or about July 23, on five or six occasions Supervisor Monahan asked Louis Leonardi, "Who started the Union?" and threatened "You guys are crazy, you are not going to get away with it" (A. 23; Tr. 91-92).

About the time Francis began questioning the Leonardi's, he also began making daily interrogations of, and threats to, maintenance employee Nare (A. 23; Tr. 37). For example, Francis asked Nare "who was responsible for associating the union and if [he] belonged to this union before or how [the employees] found this union and the Company wouldn't stand for the union. . . ." He also warned that "We'll find ways to cut down on either -- send the trucks out for repair or discharge the men" (A. 23; Tr. 36). Francis also asked Nare if he was ever in the Machinists Union (Tr. 54). Also on about July 23, Supervisor Monahan asked Nare if he was responsible for the Union, and remarked " -- now probably -- everybody will get laid off because [you] started waving the flag around" (A. 23; Tr. 38). Following DiSomma's discharge on July 26 (see *infra*, p. 6), Francis occasionally asked Nare "Where are you going to work next week?" (A. 26; Tr. 41).

Maintenance employee Winfield was also questioned daily by Francis from July 23 until his discharge on July 26, as to "who started the Union [and] who called the representative in" (A. 24; Tr. 130-131). In response, on one occasion, Winfield told Francis it was a unanimous decision of all the maintenance employees (A. 24; Tr. 131).

On July 26, Francis asked DiSomma "who started this [union] business?" (A. 24; Tr. 148-150). DiSomma replied that he did not know, and would not tell Francis if he did know (A. 24; Tr. 149). Later that day Francis terminated DiSomma (A. 24; Tr. 150). Before making his exit, DiSomma heard Supervisor Monahan tell a group of employees — "Well there's two this week, there will be two next week" (A. 24; Tr. 152).

On August 2, maintenance employee Bartoli returned from his week of vacation, and Francis immediately began questioning him as to "who brought the Union in" (A. 23-24; Tr. 66, 291). Francis made similar inquiries of Bartoli "practically daily" until Bartoli was discharged on August 8 (A. 23; Tr. 69). During one such inquiry, Bartoli told Francis that he did not want to be asked this question any more, and stated that he did not know, and would not tell even if he did know (A. 23-24; Tr. 69, 291-292). Also about August 2 Supervisor Monahan told Bartoli "I'm surprised at you, George, you know your not going to get nowhere, you are going to get laid off, they're going to lay off two at a time until . . . all go whoever signed up" (A. 24; Tr. 69-70).

C. The six maintenance employees are terminated

1. Winfield

John Winfield worked for the Company for about 2 years performing general duties as a mechanic — he repaired "anything that broke" (A.

29; Tr. 125-126). He also did some shop welding and operated a "pay-loader" from 4 to 6 p.m. almost every day (A. 29; Tr. 125-126). As shown *supra*, p. 5, beginning on or about July 23, Superintendent Francis would daily ask Winfield "who started the union" and on one occasion Winfield replied that it was a unanimous decision. On July 26, Francis summoned the Leonardi brothers to the back of the shop, stating that he wanted to show them something (A. 26; Tr. 92-93, 114). Then, in their presence, Francis terminated Winfield, and called out to all personnel within earshot: "There you all heard me tell him [Winfield] we are slowing down. We don't need him anymore" (A. 25-26; Tr. 93, 114-115, 133-134). Then Francis said to Nare "Now see what your union can do for you. There's the telephone" (A. 26; Tr. 40, 94, 121, 134). Nare attempted to place a call on the telephone but was unable to get an outside line (A. 26; Tr. 40, 134).

2. DiSomma

Salvatore DiSomma worked for the Company for more than a year doing mostly repair work and heavy and special welding (A. 30; Tr. 143). He was a first-class welder and was training a new hire named Gomez in the art of welding when he was discharged (A. 30; Tr. 144, 155). As shown *supra*, p. 5, on July 26, Francis asked DiSomma "who started this Union business" and DiSomma replied that he did not know and that if he did know he would not tell him (A. 24; Tr. 148-150). Later that day, Francis abruptly told DiSomma "We won't need you any more, it is getting slow" (A. 26; Tr. 148-150).

3. Louis and Peter Leonardi

Louis Leonardi worked as a mechanic on the night shift for 2-1/2 years (A. 29; Tr. 82). His primary job was repairing pipe machinery on which 20 to 30 laborers depended for their work the next morning (A. 29; 92). He also repaired trucks and other mechanical equipment, including the cement mixers which needed repair 2 or 3 times a week (A. 29; Tr. 82, 101-102).

Peter Leonardi had been employed by the Company for 13 months prior to his discharge on August 2 (A. 30; Tr. 107). He performed work as a maintenance mechanic and helper which included the responsibility for the greasing and cleaning of all vehicles and machines (A. 30; Tr. 107, 123).

The Leonardi brothers regularly worked the night shift - 4 p.m. until midnight (A. 29-30; Tr. 82, 107). As shown, they were among the group of employees who met with union business representative Rizzo, and they signed union authorization cards in early July. Following the Union's request for recognition, they were regularly subjected to interrogations and threats by Supervisors Francis and Monahan concerning the employees' union activities. They were scheduled to begin their vacation on August 6 (A. 26; Tr. 94). On August 1, Louis Leonardi asked Superintendent Francis "If you are not going to fire me this week . . . is it all right if I go on vacation next week?" (A. 26-27; Tr. 94). A few minutes later Francis instructed both Leonardi's to report to work for the day shift on August 2 (A. 27; Tr. 116). After working most of the day on August 2, both Leonardi brothers were given their final checks by Francis, who offered no reason for their layoff (A. 27; Tr. 117). Francis' only remark to the brothers was that he was sorry, but there was nothing he could do, it was out of his hands (A. 27; Tr. 95-96, 118).

4. Nare

Earl Nare worked for the Company for 6-1/2 years as a mechanic, working on trucks, forklifts, payloaders, pipe machines and performing general maintenance (A. 27, 29; Tr. 25-26). As indicated, *supra*, pp. 3-4, Nare had initially contacted the Union and thereafter was regularly interrogated about the Union and threatened by Superintendent Francis and Supervisor Monahan.

On August 8, Francis "laid off" Nare, telling him that "they sent your check over from the office [that] his hands were tied, [and that] he had nothing to do with it, orders came from upstairs" (A. 27; Tr. 41-42). Francis gave Nare no other explanation for his layoff, but said "You are not going to take this lying down are you? What is your Union going to do for you?" (A. 27; Tr. 42).

5. Bartoli

George Bartoli worked for the Company for almost three years as a mechanic, performing the same type of work as Nare, as well as certain welding work (A. 29; Tr. 60-61). His work was highly regarded by both Francis and Monahan (A. 29; Tr. 290). As shown *supra*, p. 5, after Bartoli returned from his vacation on August 2, both Francis and Monahan interrogated and threatened him regarding the Union. Bartoli had regularly worked a 53-hour week during 1973 and, in fact, he had only taken one week's vacation because the Company was busy at the time (A. 29; Tr. 61-62, 72-73).⁴

⁴ Pursuant to Company practice, every year maintenance employees were invited to work all or part of their two weeks' vacation at double time pay. Bartoli had worked for one week of his vacation at the end of July (A. 29; Tr. 104).

On August 8, Bartoli was "laid-off" by Francis, who said "I'm sorry that I have to let you go . . . here is your check . . . all this is coming from the office [and] it is beyond my control" (A. 27; Tr. 71). Francis gave Bartoli no reason for the layoff (A. 71).

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing facts, in agreement with the Administrative Law Judge, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating each of the six maintenance employees concerning his union activities or those of his fellow employees, and by threatening the employees with discharge, or other reprisal, for engaging in union activities (A. 25, 36). The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees John Winfield, Savlatore DiSomma, Louis Leonardi, Peter Leonardi, Earl Nare and George Bartoli because of their union activities (A. 33-35).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing employees in the exercise of their statutory rights. Affirmatively, the order requires the Company to offer reinstatement with backpay to the six employees unlawfully discharged, and to post appropriate notices (A. 36-37).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEES JOHN WINFIELD, SALVATORE DISOMMA, LOUIS LEONARDI, PETER LEONARDI, EARL NARE AND GEROGE BARTOLI IN ORDER TO DISCOURAGE UNION MEMBERSHIP.

The sole question to be determined with respect to the discharges is whether substantial evidence on the record as a whole supports the Board's findings that they were motivated by the Company's desire "to bar [the maintenance employees'] quest for representation by the Machinists and to prevent such attempts in the future" (A. 33-34), or whether they resulted from valid economic conditions, as the Company contends.⁵ As this Court has recognized, "Evidence of [motive] may consist both of direct testimony by the one whose motive is in question and of inferences of probability drawn from the totality of other facts." *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (C.A. 2, 1965). Moreover, "[e]ven if there were ample grounds to fire [the employee], . . . if his discharge was even partially motivated by his union activity, there is a violation of Section 8(a)(3)." *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (C.A. 2, 1971). We submit that the Board's finding of unlawful motivation in this case is supported by overwhelming record evidence.

As shown in the Counterstatement, in late June, the Company's six maintenance employees demonstrated an interest in representation by the Union. By July 16, all six employees had signed cards authorizing the Union to represent them. On July 20 the Union notified the Company

⁵ See *N.L.R.B. v. Midtown Service Co., Inc.*, 425 F.2d 665, 670 (C.A. 2, 1970); *N.L.R.B. v. Dorn's Transportation Co., Inc.*, 405 F.2d 706, 712 (C.A. 2, 1969).

of its majority status and requested bargaining. The Company responded by immediately commencing a massive campaign of coercive interrogations and threats against the employees which continued unabated until all six employees had been discriminatorily discharged.

Thus, on July 20, Superintendent Francis initially approached the Leonardi brothers and asked Louis Leonardi what kind of union he was in during his previous employment with the bus company. When Louis told him, Francis asked if that union had anything to do with Machinists Local 447, the Union here. Thereafter, on a daily basis, Francis made such remarks to Louis Leonardi as "I know you guys signed cards, who started it?" At the same time, Francis threatened Leonardi that "the companies are not going to put up with it. You guys are all going to get laid off."⁶ And on numerous occasions, Supervisor Monahan queried the Leonardi brothers about who started the Union and told them "you guys are crazy, you are not going to get away with it." Thereafter, on practically a daily, basis Francis engaged in systematic and repeated interrogations of each of the maintenance employees as to "who had started the Union."

As a compliment to its coercive interrogations, the Company also undertook a pattern of direct and thinly disguised threats of reprisals. Thus, in addition to the threats of discharge made to the Leonardi brothers, Francis threatened employee Nare that "the Company wouldn't stand for the Union. . . . We'll find ways to cut down — send the trucks out for repair or discharge the men or something" and pointedly asked Nare "Where are you going to be working next week?" Also, Monahan threatened Nare that "everybody will get laid off because [you] started waving the flag around" (*supra*, p. 4).

⁶ Peter Leonardi worked the same shift as his brother and heard some of the conversations between Francis and his brother Louis (A. 23; Tr. 111-114).

Indeed, even after the discriminatory discharges of employees Winfield and DiSomma on July 26 and employees Louis and Peter Leonardi on August 2 (see *supra*, pp. 5-7), the Company continued its unlawful anti-union campaign. Thus, Francis interrogated Bartoli almost daily until his discharge on August 8, and Supervisor Monahan told Bartoli "I'm surprised at you George, you know you are not going to get nowhere, you are going to get laid off, they are going to lay off two at a time until yourself all go, whoever signed up."

In the context of this blatantly unlawful anti-union campaign of coercive interrogations and threats,⁷ the Company's systematic, unannounced and unexplained discharge⁸ of the entire maintenance department within three weeks following the Union's demand for recognition is itself compelling evidence that the terminations were simply the realization of the Company's oft-repeated threats that employee support of the Union would result in layoffs, discharges, or the subcontracting of the maintenance department work. But here, the very manner in which the discharges were accomplished persuasively demonstrates their discriminatory purpose.

Immediately prior to terminating Winfield on July 26, Francis called the Leonardi brothers to the back of the shop because he wanted to "show [them] something." Francis proceeded to discharge Winfield in their presence, then turned to employee Nare, who was also present, and challenged

⁷ The Company did not specifically except to the findings by the Administrative Law Judge that it interrogated and threatened its maintenance employees in violation of Section 8(a)(1) of the Act, and it does not now contest these findings in its brief to this Court.

⁸ It is well-settled that a permanent "layoff" constitutes a discharge. *N.L.R.B. v. Bradford Dyeing Assoc.*, 310 U.S. 318, 326-330 (1940).

him to "Now see what your union can do for you."⁹ *Supra*, p. 6. This performance could have no purpose other than to serve as a warning to the remaining maintenance employees that further terminations would follow if they did not forego their organizational ambitions. This purpose was confirmed later that day when, following his discharge, shortly after refusing to inform Francis of the identity of the union leader, DiSomma overheard Supervisor Monahan tell a group of employees, "Well, there's two this week, there will be two next week."

Of course, this threat was not an idle one, for the other four employees were indeed discharged in pairs the following two weeks. Moreover, Francis supplied no explanation for the layoffs other than such cryptic comments as "it was out of his hands", there was "nothing he could do" about it, and that "orders had come from upstairs" or from "the office."¹⁰

Indeed, the Company's unlawful discriminatory motivation was virtually admitted at the outset, when Superintendent Francis initially asked employee Leonardi who started the Union movement and threatened him that "The companies are not going to put up with it. You guys are all going to get laid off." Francis also accurately predicted to employee Nare that "... the Company wouldn't stand for the Union ... we will find ways to cut down on either — send the trucks out for repair or discharge

⁹ The Company's assertion that Francis did not know about the Union until July 30 is clearly undercut by this comment as well as by Francis's previous interrogation of the employees regarding the Union. Indeed, in his interrogation of Louis Leonardi on or about July 20, Francis specifically asked if the union at Leonardi's former employers was in any way connected with the Machinists Local 447 (*supra*, p. 4). Moreover, Francis admitted that DiSomma asked him whether his July 26 layoff was because of the Union (A. 26; Tr. 247).

¹⁰ These statements belie the Company's claim that Francis alone decided to lay off these employees (A. 27).

the men." Any lingering doubt of the Company's unlawful motive is dispelled by Supervisor Monahan's comment and threat to employee Bartoli after the August 2 discharges that "I am surprised at you, George, you know you're not going to get nowhere, you are going to get laid off, they're going to lay off two at a time until . . . all go whoever signed up" (*supra*, p. 5).

The Company denies any unlawful motive and asserts that the layoffs of Winfield and DiSomma on July 26 were based on solely nondiscriminatory considerations — *i.e.*, a slowdown of work — and that the termination of the other four maintenance employees, Louis and Peter Leonardi, Earl Nare and George Bartoli, was because of this lack of work and because they failed and refused to perform assigned work in protest over the layoffs of Winfield and DiSomma. However, as we show below, the testimony adduced by the Company failed to advance its claim of legitimate motivation.¹¹ The failure of the Company's explanations to withstand scrutiny only serves to buttress the Board's inference of discrimination. *Trey Packing Co. v. N.L.R.B.*, 405 F.2d 334, 339 (C.A. 2, 1968), cert. denied, 394 U.S. 919; *N.L.R.B. v. American Casting Service, Inc.*, 365 F.2d 168, 171-172 (C.A. 7, 1966); *N.L.R.B. v. Grigg Equipment Co., Inc.*, 307 F.2d 275, 278 (C.A. 5, 1962). For when a reason for a layoff or a discharge by an employer is false, the inference may be properly drawn that there is another, unlawful, motive for the discharge. *Shattuck-Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966).

¹¹ The Board's findings were based upon the credited testimony of employees which in some instances was contradicted by Company witnesses. In making these and other credibility resolutions, the Administrative Law Judge, who saw the witnesses, weighed their demeanor, the related testimony of other witnesses, and other relevant factors, as shown in his decision. It is well-settled that resolutions of credibility are matters for the trier of fact, and should not be upset on review absent extraordinary circumstances, which do not exist here. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

Here, the Company contends that at the end of July the maintenance employees had completed work on the 12 army surplus "dollies" the Company had purchased in April, ¹⁹⁷³ and that consequently there was a lack of work for the maintenance employees. While it is true that between May and July the maintenance employees did perform some work on converting these 12 dollies into "bogies,"¹² it is clear from the record that there was no lack of regular maintenance work to be done (A. 31-32; Tr. 59, 79-80, 140, 153-154). Thus, prior to the purchase of the dollies, four of the maintenance crew had been continuously employed for more than two years, and the other two had been so employed in excess of one year (A. 12-13). Moreover, during the period of the dollies' conversion to bogies, the six-man maintenance department, which had performed the Company's maintenance work for about a year before the short-term (3-4 month) bogie project was begun, continued to perform the Company's regular maintenance work. Indeed, some of the maintenance employees worked overtime, Saturdays, and even gave up part of their vacation in order to stay abreast of this work.

¹² A bogie is a large metal frame from 80 to 100 feet long with eight wheels, which the Company used as a trailer to haul beams and other heavy pre-stressed concrete work. This process requires the welding or "refabricating" of heavy metal plates and the necessary mechanical and electrical work (A. 28; Tr. 57-58). Bartoli, whose work and competence was highly regarded by Francis and Monahan, was given charge of the conversion project and distributed the work to the rest of the men. Bartoli spent about one-half of his time during a two-month period working on the bogies (A. 29; Tr. 79). Winfield did "some work" on the bogies but not every day (A. 30; Tr. 137). DiSomma spent a "considerable amount" of time on the bogie project (A. 30; Tr. 156). Nare spent about 2 hours a day working on the bogies (A. 29; Tr. 58-59). Louis Leonardi spent 1 or 2 hours a night working on the bogies, when he had time left over from his other priority duties (A. 29; Tr. 98-99, 101, 105-106). Peter Leonardi spent about 4 hours on most, but not all nights, working on the bogies (A. 30; Tr. 119, 122).

For example, mechanic Winfield testified that when he was laid off on July 26, there were several major repair jobs in process and other jobs waiting to be done — unrelated to work on bogies — including the rebuilding of a “payloaders” transmission, which would take the mechanics 3 more weeks to complete (A. 30; Tr. 139-140). Similarly, when DiSomma was “laid off” on July 26, he had been spending most of his time on the special welding of large pallets, a job which only he was permitted to do, and which was unrelated to work on bogies (A. 30; Tr. 158-161). Indeed, Supervisor Monahan told DiSomma that there were three or four months of full-time work to be done on these large pallets (A. 30; Tr. 160-161). Illustrative of the large amount of maintenance work to be done is the fact that prior to his discharge, DiSomma worked several hours overtime each week, 2 or 3 Saturdays a month, and at the Company’s request had consented to work one week of his vacation because he was told there “was plenty of work” for him (A. 20; Tr. 153-154). Moreover, as DiSomma pointed out, maintenance work on bogies was never finished, since they would break or crack and would always need repair (A. 30; Tr. 157). Also, the Leonardi brothers were never short of work assignments and, in fact, after Winfield and DiSomma were laid-off on July 26, there was “more work . . . many more jobs to be done” (A. 32; Tr. 328-330), and “the [assignment] board was full of work to do” (Tr. 119-120). Finally, Eartoli, who regularly worked 13 hours of overtime a week during his employment, worked his July 4th holiday at Francis’ request, not on bogie work, but repairing a concrete mixer (A. 29; Tr. 61-62, 72-73, 309). And Bartoli, like Nare, was never told or given any indication that the work was slowing down (A. 29; Tr. 43, 72).

It is clear from the above, as the Board found, that "there was full-time work for the regular six-man [maintenance] department after July 26 to the same extent as existed for the long-term preceding the interval of the bogies" (A. 32). In addition, the Board's finding that the Company's lack of work defense was pretextual is supported by the fact that Arty Carbone and Rodriquez Gomez, who were hired in the spring of 1973, purportedly as laborers,¹³ and were assigned to perform welding work on the bogies, were retained in maintenance work after the layoff of the regular maintenance employees (A. 30-31, 33; Tr. 141, 144-145, 269-270, 323).¹⁴ Moreover, the Company admits that it began hiring new maintenance employees in late August, and that after a turnover of four such employees who proved inadequate, two suitable mechanics were found and have been performing maintenance work ever since (A. 31; Tr. 216, 225, 306).

The Company's claim (Br. 16-17) that its lack of work defense is substantiated by the fact that it now has only two employees doing the maintenance work is not convincing. As the Board observed, the Company "ha[s] not probatively disclosed what was actually done after the terminations concerning performances of all the maintenance work which the record shows existed in full measure" (A. 33). Specifically, the Company failed to produce evidence disclosing the extent to which the new hires or other employees have been utilized as general maintenance employees, or whether the trucks and other equipment previously serviced in

¹³ Francis testified that Gomez "was going to be a laborer" and that he was "half laborer and half maintenance" working on the bogies with DiSomma who was teaching him welding; and that at the time DiSomma was laid-off Gomez "was going to be switched to a laborer" (Tr. 268-270, 277).

¹⁴ Gomez received the same pay as did Winfield and Bartoli and 50-cents an hour more than DiSomma (A. 31; Tr. 61, 145, 310). Yet DiSomma, who was admittedly a more competent welder than Gomez, was dismissed, while Gomez continued to work (A. 30-31; Tr. 141, 144-145, 269-270, 321).

the maintenance department were being sent out for such service, as earlier threatened by Francis.¹⁵ The Company's failure to produce such evidence warrants the inference that if produced, the evidence would be adverse to its contention. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 174 and n. 3 (1973).

Finally, the Company's further contention (Br. 16-17) that it terminated the Leonardi brothers and Nare and Bartoli because they did not perform their work "in a proper and efficient manner" is clearly without merit. According to Superintendent Francis, before July 26, these four employees performed satisfactorily (A. 32; Tr. 252, 256, 259-260, 263). However, Francis claimed that after July 26, the employees were not able to complete their maintenance work in a timely fashion (Tr. 252-253, 256-257, 260, 263). The obvious explanation for this alleged deficiency is that after July 26 there was, as shown, still a full measure of maintenance work to be completed, but with two less maintenance employees to perform it. Moreover, these four remaining maintenance employees, with job tenures ranging from over 1 year to 6-1/2 years, had never been warned or reprimanded for inefficient work (Tr. 43, 96, 118-119, 288, 298-299, 333). Indeed, their immediate Supervisor, Monahan, admittedly did not speak to any of these employees regarding alleged deficiencies, but merely informed Superintendent Francis that certain work had not been done (A. 32; Tr. 210, 212). And Francis, who admitted that there were "always complaints with everyone", merely requested the employees to "hustle it up" or to get a needed repair job done (A. 32; Tr. 260, 309). In these circumstances, we submit that the Board reasonably concluded

¹⁵ Indeed, the Company admittedly adopted a different method of operating the maintenance department since the terminations. Thus, it has eliminated the night shift (A. 31; Tr. 189); all maintenance welding is now being performed by laborers (A. 32; Tr. 313-314); and the two newly hired maintenance employees are required regularly to work overtime (A. 31; Tr. 195-196, 216, 225, 306).

that the Company's comp' int about the employees' sudden inefficiency, which, predictably, coincided with the Company's awareness of their union sympathies, was simply a pretext to cloak the real, unlawful reason for their termination.¹⁶

¹⁶ The Company now argues for the first time (Br. 18-20) that the Administrative Law Judge committed prejudicial error by refusing to permit Company counsel to question employees Nare, Bartoli and Louis Leonardi regarding whether or not they had made application for unemployment benefits and "the reasons, if any, given for applying . . ." (Tr. 56, 76-78, 104-105). The Company's attempt to raise this issue in this Court for the first time is expressly precluded by Section 10(e) of the Act, which provides: "No objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This provision reflects "the salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged on review of its order." *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256 (1943). As the Supreme Court has also stated, ". . . orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the court." *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). See also, *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *KFC National Management Corp. v. N.L.R.B.*, 497 F.2d 298, 300 n. 1 (C.A. 2, 1974); *N.L.R.B. v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 454 (C.A. 2, 1960). This principle applies to questions of procedural due process and the Board's interpretation of the Act, as well as to factual determinations. See *Marshall Field & Co. v. N.L.R.B.*, *supra*, 318 U.S. at 256; *N.L.R.B. v. Ra-Rich Mfg. Corp.*, *supra*, 276 F.2d at 454.

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should be entered denying the petition to review and enforcing in full the Board's order.

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April, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CLEARVIEW CONCRETE PIPE CORP.,)
d/b/a CLEARVIEW CONCRETE PRODUCTS)
CORP., AND GRAND PRE-STRESSED)
CORP.,)

Petitioners,)

No. 74-2604

v.)

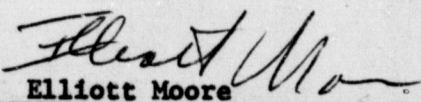
NATIONAL LABOR RELATIONS BOARD,)

Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's
offset printed brief in the above-captioned case have this day been served
by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 28th day of April, 1975